tices against Respondent), from which actions Respondent suffered actual damages to the extent of $365,000.00.

Petitioner, having conceded for the purposes of its Petition for Writ of Certiorari that the jury's verdict in the second trial was supported by the evidence, raises no points peculiar to an antitrust case. Instead, Petitioner limits its attack on the Court of Appeals' decision solely to the affirmance of the trial court's granting of a new trial following the first trial, requesting this Court to grant certiorari and to hold that the Court of Appeals erred in failing to find that the trial court abused its discretion in granting a new trial.

Respondent's Motion for New Trial stated as grounds therefor:

"I.

"Because the verdict of the jury is so clearly against the overwhelming weight of the evidence * * *

"II.

"The verdict of the jury in favor of Defendant Association is unconscionable and so clearly against the overwhelming weight of the evidence that same should be disregarded * * *" (R. 1236)

The Order Granting New Trial recites:

"ORDERED, (3) that the motion of Plaintiff for new trial be granted on the grounds that, considering the evidence as a whole and weighing it, the Court is of the opinion that the verdict of the Jury is wrong and is contrary to the weight of the evidence, and for the further reason that the Court is of the opinion that error was committed in statements made by the Court to the members of the Jury after the Jury had indicated in writing that they were unable to reach a verdict, which statements by the Court had the effect of coercing the verdict." (emphasis added) (R. 1261)

The Statement in the Petition for Writ of Certiorari is argumentative and is not an accurate statement of the nature and result of the case. However, in the interest of brevity, no specific reference to the many inaccuracies will be made. For the purpose of this reply brief, Respondent adopts the statement of the nature and result of the case set forth in the opinion of the Court of Appeals.

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

1. The Seventh Amendment of the United States Constitution is not violated by a United States District Court's entry of an Order Granting a New Trial after a jury verdict which is "wrong and contrary to the weight of the evidence." (R. 1261)

2. The Order Granting a New Trial recites valid reasons therefor, including, "* * * the verdict of the jury is wrong and contrary to the weight of the evidence * * *." (R. 1261)

3. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial explicitly on such basis, no error was committed by the trial court's stating additional grounds for granting the new trial.

4. Respondent's filing of an affidavit in the trial court is no reason for review of this case by the Supreme Court, particularly when there is nothing in the record to indicate that the trial court either "accepted" or relied upon such affidavit.

5. There was no error by the trial court in ordering a new trial because "the verdict is wrong and contrary to the weight of the evidence * * *" where the Motion for New Trial assigned such ground as error.

6. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial explicitly on such basis, no error was committed by the trial court's mentioning other considerations for granting a new trial.

7. Where the Motion for New Trial alleged that the verdict was against the weight of the evidence and the court's Order granted a new trial on such basis, no error was committed by the trial court's recitation of other factors it considered relevant in deciding to grant a new trial.

ARGUMENT

Order Granting New Trial Does Not Violate Right of Trial by Jury

Petitioner here seeks to have this Court declare that the Seventh Amendment of the United States Constitution is violated if a federal district court orders a new trial when "the verdict of the jury is wrong and contrary to the weight of the evidence." The decisions of the Supreme Court and of the Courts of Appeals have repeatedly held just the opposite—i.e., that the common law power to grant or deny a motion for new trial is an important function of the trial judge in conducting a jury trial. As stated by Justice Gray

in *Capital Traction Co. v. Hof*, 174 U.S. 1, 13, 19 S. Ct. 580, 43 L. Ed. 873, 877 (1898):

> " 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of *a judge empowered* to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) *to set aside their verdict if in his opinion it is against the law or the evidence.* This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." (emphasis added)[1]

It has also been clearly recognized that such power to grant a new trial is not in derogation of the Seventh Amendment's guarantee of trial by jury. For example, as pointed out by Judge Taft in the often cited case of *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576, 583:

> "There is a suggestion, in the opinion of the judge at the circuit on the motion for new trial, that to set aside a verdict as against the weight of the evidence is in violation of the seventh amendment to the constitution, providing that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. An examination of Judge Lurton's opinion in the Lowery Case will

[1] Similar statements are made in numerous Court of Appeals decisions. For example, see: *Maryland Casualty Co. v. Reid*, 5 Cir., 1935, 76 F. 2d 30; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576.

> show that it was the habit of the judges of England, whence came the common law, to set aside verdicts as against the weight of evidence as early as Lord Mansfield's time and earlier. This would seem to show that the re-examination of the evidence necessary to set aside a verdict on such a ground was according to the rules of the common law."[2]

The extent of the power of the federal courts to grant new trials within the scope of our constitutional safeguards is clearly set forth in Judge Parker's definitive opinion in *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350, 352, as follows:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. *The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.*" (emphasis added)

Appellate Review of Granting of New Trial Is Very Limited Because of Trial Judge's Broad Discretion

Petitioner complains that the Court of Appeals followed the uniformly accepted rule that the scope of appellate review of a trial judge's granting or denying a motion for new trial is very limited because of the broad discretion vested

[2] See also *Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 433, 7 L. Ed. 732 (1830); *Marsh v. Illinois Central R. Co.*, 5 Cir., 1949, 175 F. 2d 498.

in a district judge. Such complaint provides no reason for granting the Petition, for the Court of Appeals' recognition of this long established principle is not in conflict but rather is consistent with the pronouncements of the Supreme Court[3] and of the other Circuit Courts.[4]

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[3] In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1932), this Court reversed the judgment of the Circuit Court of Appeals which had reversed a trial court's denial of a motion for new trial. In the Court's opinion, at page 481, Justice Brandeis states:

> "The rule that this Court will not review the action of a federal trial judge in granting or denying a motion for new trial for errors of fact has been settled by a long and unbroken line of decisions * * * (citing 14 Supreme Court decisions) * * * The rule precludes likewise a review of such action by a circuit court of appeals. * * * More frequently the reason given for the denial of review is that the granting or refusing of a motion for new trial is a matter within the discretion of the trial judge." (citing 15 Supreme Court decisions)

This rule was expressly recognized in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247, 60 S. Ct. 811, 84 L. Ed. 1129 (1939); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); and *United States v. Johnson*, 327 U.S. 106, 111, 66 S. Ct. 464, 90 L. Ed. 562 (1945).

[4] For example, *Silverii v. Kramer*, 3 Cir., 1962, 314 F. 2d 407; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Turner v. United States*, 6 Cir., 1956, 229 F. 2d 944, cert. den., 351 U.S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956); *Stinebower v. Scala*, 7 Cir., 1964, 331 F. 2d 366; *Moist Cold Refrigerator v. Lou Johnson Co.*, 9 Cir., 1957, 249 F. 2d 246, cert. den., 356 U.S. 968, 78 S. Ct. 1008, 2 L. Ed. 2d 1074 (1958); *Tidewater Oil Company v. Waller*, 10 Cir., 1962, 302 F. 2d 638. In *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576, the Court, at page 581, states:

> "A motion for a new trial is, of course, addressed to the discretion of the court, and, if the court exercises its discretion, and either grants or denies the motion, its action is not the subject of review. This is so well settled that it is unnecessary to cite authorities upon the point. But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury."

This Court and the Courts of Appeals have held that, although the trial judge's exercise of discretion is ordinarily not reviewable on appeal, an appellate court may nevertheless determine whether a trial judge has abused his discretion.[5] If an abuse is found, the appellate court may and will correct such error; otherwise, the trial judge's exercise of discretion will not be disturbed. This is exactly the procedure followed by the Court of Appeals here. The Petitioner asserted below that the trial court had abused its discretion in granting the new trial, and the Court of Appeals examined the record and determined that there was no abuse of discretion. It was not the function of the Court of Appeals to determine whether it would have ruled on the motion as did the trial judge. Rather its duty was to determine under the record and in light of the circumstances whether the order granting the new trial constituted a clear abuse of discretion. The Court of Appeals correctly found that it was not.

Reasons for Trial Judge's Broad Discretion in Granting New Trial

Petitioner further complains that, because of the limited scope of review, the Fifth Circuit and other federal appellate courts rarely reverse a trial court's granting of a new trial. Such complaint likewise furnishes no basis for granting the Petition for Writ of Certiorari.

It is true that federal appellate courts have rarely reversed a trial court's granting of a new trial. The same is also true in the more common case of a trial judge's denial of a motion

[5] See cases cited in footnotes 3 and 4, supra.

for new trial. Such facts do not serve as a valid basis for Petitioner's charge that Courts of Appeals affirm any and all decisions by district judges to grant new trials; rather, they point up the scarcity of occasions that trial judges have abused their discretion or failed to follow the proper standards in considering motions for new trial. Even more significantly, such clearly indicates that the Fifth Circuit and the other Courts of Appeals have consistently recognized the reason for a trial judge, at common law and under our Constitution and Rules, to be given broad discretion in performing his duties in conducting jury trials. The trial judge, because of his actual presence and participation at the trial, "has the feel of the case which no appellate printed transcript can impart" and is in a position "to view the proceedings in a perspective peculiarly available to him alone."* Recognizing such facts, the Courts of Appeals will not disturb a trial judge's exercise of discretion except where an abuse is clearly evident.

The record here revealed no abuse of discretion in granting the new trial, and the Court of Appeals correctly affirmed the trial judge's action. Therefore, no reason for review by this Court exists.

Trial Judge Properly Granted New Trial Since Verdict Was Contrary to the Weight of the Evidence

At the conclusion of the first trial, the trial court granted Respondent's motion for new trial on the ground "that upon consideration of the evidence as a whole and weighing it, the

* *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 216, 67 S. Ct. 752, 91 L. Ed. 849 (1946).

Court was of the opinion that the verdict of the jury was wrong and was contrary to the weight of the evidence." Petitioner contends that a trial judge should not weigh the evidence in considering a motion for new trial and cannot grant a new trial if some evidence in defense of the charges of the movant has been presented. In essence, Petitioner is asserting that the trial judge here should have followed the standards applicable to ruling on a motion for judgment notwithstanding the verdict when considering the motion for new trial, and also that the Court of Appeals should have used the tests applicable to motions for judgment n.o.v. in determining whether the trial court had abused its discretion in ruling on the motion for new trial.

The decisions of this Court and of the Courts of Appeals uniformly recognize that **a trial judge exercises an entirely different function in passing upon a motion for new trial than when ruling upon a motion for judgment notwithstanding the verdict.**[1] As stated by Justice Roberts in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147, 153 (1940):

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the motion failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive,

[1] *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Felton v. Spiro*, 6 Cir., 1897, 78 F. 576; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 1941, 122 F. 2d 350; *Tidewater Oil Company v. Waller*, 10 Cir., 1962, 302 F. 2d 638; *Marsh v. Illinois Central R. Co.*, 5 Cir., 1949, 175 F. 2d 498.

or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury."

Petitioner has failed to recognize this distinction!

In considering a motion for judgment n.o.v., a trial judge does not weigh the evidence, but rather determines only whether there is some evidence to support the verdict of the jury. If so, a motion for judgment n.o.v. must be denied. On the other hand, a motion for new trial is addressed to the judge's discretion and he may consider the evidence as a whole, weigh it, and if he thinks the jury was mistaken or that the verdict was wrong or that some injustice might occur if the verdict were allowed to stand, although supported by some evidence, he should grant a new trial.[8]

The two decisions of the Supreme Court cited by Petitioner, purportedly to show conflict between the Fifth Circuit and this Court, have no relevance here, since both deal with the question of the scope of a trial court's review of the evidence in considering a motion for judgment n.o.v. and

[8] In *Williams v. Nichols*, 4 Cir., 1959, 266 F. 2d 389, the trial judge, as Petitioner here, failed to distinguish between the two types of motions. There, the trial judge held that in passing on the motion for new trial he must consider the evidence most favorable to the party for whom the verdict was rendered. The Court of Appeals found that the trial court had applied the standard applicable to a motion for directed verdict or a judgment n.o.v., "rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice." The Court of Appeals vacated the judgment and remanded the case for reconsideration of the motion for new trial, "not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence, considering also any other relevant factors."

an appellate court's review of the evidence on appeal from the verdict.* Neither case involves or discusses the functions of either a trial or appellate court in considering a motion for new trial where different rules govern, as pointed out above. The trial judge below applied the correct standard in considering the motion for new trial, and the Court of Appeals properly affirmed such action. Again, no important or special reason for review by this Court is shown by Petitioner.

Trial Judge Properly Considered Other Factors in Granting New Trial

Petitioner has also asserted that the Court of Appeals erred in failing to hold that the trial judge abused his discretion in granting a new trial because he felt that his statements had coerced the jury's verdict and because of the pendency of another suit involving the same questions of fact and law. Such contention furnishes no reason for review by this Court.

This Court and the Courts of Appeals have pointed out that, if for any reason or combination of reasons a trial judge

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* *Mary Tennant v. Peoria & Pekin Union Railway Company*, 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520 (1944), and *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1945), are merely holdings that a trial court, in considering a motion for directed verdict or a motion for judgment notwithstanding the verdict, or an appellate court, on an appeal from a judgment on the verdict, shall look only to see if there is *some* evidence to support the verdict. If so, even if not substantial or even if the trial judge or appellate court would have drawn conclusions to the contrary, the jury's verdict should not be disturbed. Neither case involves a trial judge's ruling on a motion for new trial or an appellate court's review thereof.

concludes that injustice will result if a verdict is allowed to stand, he has the power and duty to grant a new trial.[10] Here, the trial court decided, in addition to the verdict's being against the weight of the evidence (which was itself sufficient justification for granting a new trial), other factors had possibly caused the jury to reach an unjust result and were considerations in determining that a new trial should be granted. Recognizing that the trial judge was uniquely cognizant of the factors and circumstances surrounding and influencing the outcome of the jury trial, the Court of Appeals properly affirmed the trial judge's ruling, since the record revealed no abuse of discretion.

CONCLUSION

Respondent submits that the Petition for Writ of Certiorari should be denied, since no special or important reasons for granting such Petition are shown or, in fact, exist. There is no conflict between this decision of the Court of Appeals and the decision of another Court of Appeals or of the Supreme Court on the same matter. The Court of Appeals has in no way departed from the accepted and usual course of judicial proceedings nor has it sanctioned a departure from proper judicial proceedings by the trial court. No basis has been demonstrated by Petitioner for this Court's exercising its power of review and supervision. To the contrary, the trial court applied the proper standards or tests in considering and granting the motion for new trial, and the Court of

[10] *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Eastern Air Lines v. Union Trust Co.*, U.S. App., D.C., 1956, 239 F. 2d 25, 30.

Appeals properly followed the rules pertaining to the scope of appellate review, as announced by the Supreme Court and the Courts of Appeals, in determining that the trial judge had not abused his discretion. Furthermore, the authority and discretion of a trial court to grant a new trial does not deny the right of trial by jury, but rather protects and preserves such right. Respondent, therefore, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been delivered to counsel for Petitioner by posting same in the United States mail, postage prepaid, properly addressed, on this the 29th day of October, 1965.

Charles P. Storey

Charles P. Storey

END